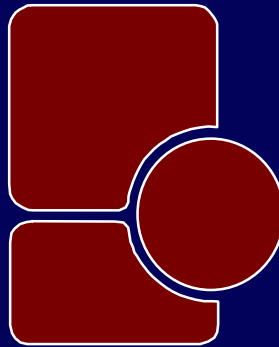


**Joint Legislative Audit and Review Commission
of the Virginia General Assembly**



**Review of the Use of
Grievance Hearing Officers**

**Staff Briefing
December 13, 1999**

Introduction

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Presentation Outline

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- ☒ Introduction and Summary of Findings
- ☐ Performance and Oversight of Grievance Hearing Officers
- ☐ Assessment of the Current Grievance Hearing System

Study Mandate

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- Item 16 O of the 1999 Appropriation Act directs JLARC “to conduct a review of grievance hearings, in particular the utilization of hearing officers.”

Grievance Procedure

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- The grievance procedure is the formal process in which State classified, non-probationary employees can bring workplace complaints to upper levels of management in an agency.
- An employee may pursue a formal written grievance through three resolution steps in which successively higher levels of management must respond to the grievance.

Grievance Procedure

(continued)

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- For certain types of complaints, such as those related to disciplinary actions, the employee also has a right to be heard by an independent third party who decides the merit of the grievance, and if appropriate, the remedies.
- The Commonwealth uses administrative hearing officers to conduct grievance hearings:
 - Hearing officers are typically private sector attorneys eligible to preside at State agency administrative hearings
 - As of August 1999, there were 124 grievance hearing officers
- By law, hearing officers' decisions in grievance cases are "final and binding if consistent with law and policy."

Division of Responsibilities for Grievance Hearings

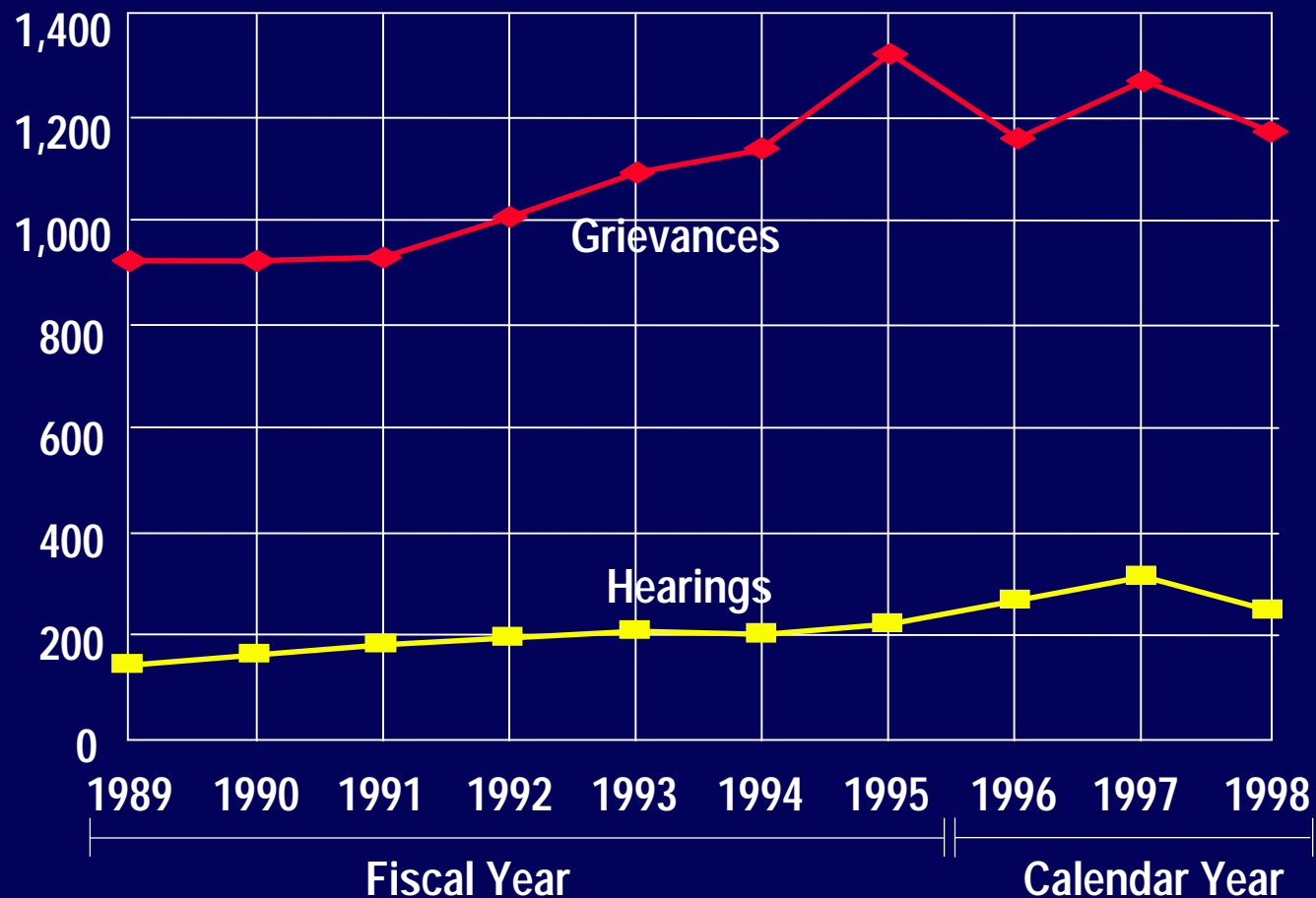
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■ Four entities have grievance-related responsibilities:

- The Office of the Executive Secretary of the Supreme Court (OES) appoints and maintains the official list of hearing officers.
- The Department of Employee Relations Counselors (DERC) is responsible for administering and overseeing the grievance process. DERC uses the OES' list to select hearing officers for individual grievance cases.
- Administrative hearing officers hear cases and write decisions that determine the outcomes of grievances.
- Upon request, the Department of Personnel and Training issues rulings on whether a hearing officer's decision is consistent with State policy.

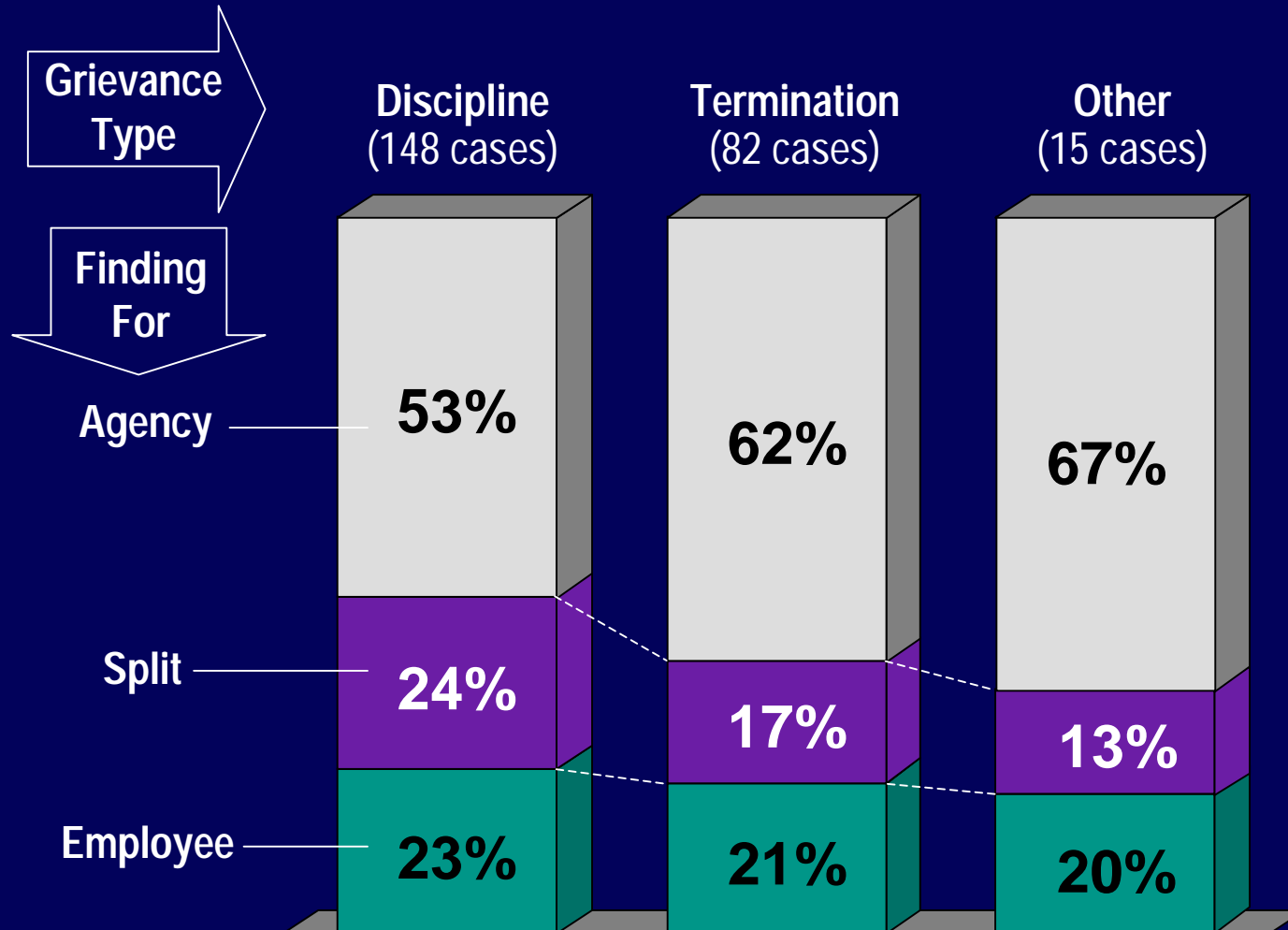
Trends in the Numbers of Grievances and Hearings

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Grievance Hearing Outcomes by Type of Grievance, 1998

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Agencies with Most Grievances (CY 1998)

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<u>Agency</u>	<u>Number of Grievances</u>	<u>Number of Hearings</u>	<u>Total Cost</u>
Corrections	469	92	\$69,628
Mental Health, Mental Retardation and SAS	228	50	\$46,432
Transportation	88	31	\$31,362
Juvenile Justice	55	18	\$15,515

Study Issues

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- Are required qualifications and training for hearing officers adequate?
- Do hearing officers appear to meet performance expectations?
- Is DERC's selection and oversight of hearing officers appropriate?
- Should the grievance hearing process include an appeal of hearing officer decisions?
- Would an alternative hearing officer structure result in a more cost-effective, efficient, and fair system for hearing grievance cases?

Research Activities

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- **Structured interviews**
- **Survey of grievance hearing officers**
- **Analysis of DERC grievance-related databases**
- **Review of DERC and OES evaluation files for hearing officers**
- **Review of DERC and DPT formal rulings pertaining to grievance hearings**
- **Review of OES hearing officer appointment files**
- **Review of other states' grievance hearing structures**
- **Document reviews**

Summary of Findings

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- JLARC staff found that the hearing officer structure is generally adequate.
- Hearing officer performance could be improved with better training and oversight, and by providing more opportunities to gain expertise.
- The selection and removal of hearing officers by DERC appears generally appropriate.
- No fundamental changes to the structure of the process are needed at this time, although actions are warranted to correct specific deficiencies.

Presentation Outline

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- ☐ Introduction and Summary of Findings
- ☒ **Performance and Oversight of Grievance Hearing Officers**
- ☐ Assessment of the Current Grievance Hearing System

Hearing Officer Performance Appears Generally Adequate

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- Most hearing officers receive satisfactory evaluations from DERC and the parties involved in grievance hearings.
- State agencies and employee associations reported general satisfaction with the performance of most hearing officers.
- Few grievance decisions are remanded to hearing officers for revision.

Some Hearing Officers Do Not Meet Performance Expectations

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- Despite the overall satisfaction with hearing officers, results of the JLARC review also suggest that there are problems with the performance of some hearing officers.
- Areas of concern cited by DERC and grievance parties include:
 - Untimely decisions
 - Decisions that are inconsistent with State policy or the grievance procedure
 - Hearings that are conducted in an overly legalistic manner
 - Unprofessional behavior by hearing officers

State Oversight of Grievance Hearing Officers

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- Section 2.1-116.03-6 of the *Code of Virginia* gives the following authority to DERC:

Establish a process to select, on a rotating basis, hearing officers from the list maintained by the Executive Secretary of the Supreme Court; train and assign such hearing officers to conduct grievance hearings; and evaluate the quality of their services to determine eligibility for continued selection.

- Consistent with a recent court case, this language gives DERC authority to modify the Executive Secretary's list of hearing officers for its own purposes. DERC has made use of this authority in the past year through the development of a new selection policy and removal of some hearing officers from the list of those who may hear grievance cases.

Selection of Hearing Officers

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- DERC uses a system of rotation to select a hearing officer from the appropriate geographic region with the oldest previous DERC assignment.
- The selected hearing officer is evaluated for availability, and deemed unavailable if he or she:
 - already has an unfinished case from DERC;
 - fails to return DERC's call within 24 hours;
 - is unable to complete the case in 30 days; or
 - has a conflict of interest regarding the case.
- If the hearing officer is unavailable, DERC selects the hearing officer with the next oldest previous DERC selection date.

No Apparent Evidence of “Judge-Shopping” by DERC

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- Questions have been raised as to whether DERC is engaging in “judge-shopping” in making its hearing officer assignments to grievance cases.
- JLARC staff examined the distribution and chronology of case assignments and followed up with DERC staff on any assignments that appeared unusual. JLARC staff also examined the decision records of hearing officers who have received an above-average caseload.
- Based on these analyses, it appears that DERC assigns hearing officers to grievance cases on a rotating basis, consistent with its selection policy.

Lack of External Oversight Raises Concerns

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- **As long as DERC has absolute selection authority without any means for external oversight, there will always be questions about possible judge-shopping.**
- **The OES should play a role in overseeing the selection of hearing officers by DERC. An efficient way to implement this oversight role would be to consolidate the hearing officer lists of the OES and DERC into the same automated database.**

Recommendations

21

- **The General Assembly may wish to amend the *Code of Virginia* to:**
 - **Direct the Executive Secretary of the Supreme Court to provide oversight of DERC's hearing officer selection process, and**
 - **Require the OES and DERC to use a shared database for selection of hearing officers.**

Evaluation of Hearing Officers

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- Over the past 18 months, DERC has used an enhanced evaluation process designed to improve the accountability of hearing officers.
- This revised evaluation process appears to be a generally sound method for evaluating hearing officers.
- However, DERC needs to develop a written policy regarding its rating system to ensure consistency between its ratings and reappointment recommendations.
- Further, DERC needs to collect additional information on the timeliness of hearing officers' work.

Evaluation of Hearing Officers

(continued)

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- Concerns have been raised that DERC may only recommend for reappointment hearing officers who decide mostly in favor of agency management.
- To check for bias in DERC's assessment of hearing officers, JLARC staff reviewed the decision records of hearing officers who were recommended for reappointment compared to those who were not.
- JLARC staff found no indication that hearing officer decision outcomes impacted DERC's evaluation of the hearing officers.

Recommendations

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- **DERC should develop a written policy describing its evaluation process and rating system, and follow this policy in future evaluation ratings of hearing officers.**
- **DERC should begin tracking the date of grievance hearings in order to better assess the timeliness of hearing officers' work. It should specifically examine the time between the hearing date and the date of the written decision.**

Removal of Hearing Officers

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- The OES has the option not to reappoint a hearing officer at the end of his or her three-year term or to remove a hearing officer at any time for cause. The OES rarely removes a hearing officer from its list.
- According to DERC policy, the DERC director can remove a hearing officer from the list of those who may hear State grievance cases based on:
 - concerns with the quality and timeliness of the hearing officer's work;
 - the fitness of the hearing officer from the standpoint of professionalism, temperament, and demeanor; or
 - because of a pending recommendation from DERC to the OES to have the hearing officer removed from the OES list.

Removal of Hearing Officers

(continued)

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- Based on the DERC criteria, eight hearing officers have been removed from hearing grievance cases during the past year. One other hearing officer was removed in 1996.
- Since inadequate hearing officer performance can negatively impact the grievance process, it appears appropriate for DERC to make removal decisions based on the performance measures it has developed.
- However, to preserve independence of the system, hearing officers should be able to appeal DERC's removal decisions to the OES.

Recommendation

27

- The General Assembly may wish to amend section 2.1-116.03 of the *Code of Virginia* to explicitly authorize DERC to remove hearing officers from the list of hearing officers qualified to hear grievance hearings. In addition, the General Assembly may wish to amend the *Code of Virginia* to provide for an appeal of a hearing officer's removal to the Executive Secretary of the Supreme Court.

Presentation Outline

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- ☐ Introduction and Summary of Findings
- ☐ Performance and Oversight of Grievance Hearing Officers
- ☒ **Assessment of the Current Grievance Hearing System**

Ability of Current System to Meet Grievance System Goals

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Goal	Assessment
Impartiality of Hearing Officers	✓
Independence of Hearing Officers	✓
Consistency of Decisions	✗
Expertise of Hearing Officers	○
Timeliness of Decisions	○
Cost-effectiveness of Process	✓

Key: ✓ = Meets Goal ○ = Needs Improvement ✗ = Does Not Meet Goal

Number of Hearing Officers Should Be Reduced

30

- In 1998, there were 121 DERC qualified hearing officers who were assigned 296 grievance cases.
 - This was an average of only 2.4 cases per hearing officer.
 - The average by region varied from 1.7 cases for hearing officers in Northern Virginia to 3.3 cases for hearing officers in Richmond.
- There is a consensus of opinion that the number of hearing officers should be reduced.
- To effect this reduction, the OES and DERC should work together to identify a target number of hearing officers for each region and develop a strategy for reducing the number currently on the list.

Recommendations

31

- The General Assembly may wish to consider amending section 9-6.14:14.1 of the *Code of Virginia* to give the Executive Secretary of the Supreme Court specific authority to set a limit on the number of hearing officers in each region.
- The OES, in coordination with DERC, should develop a plan to reduce the number of hearing officers in those regions where there are currently too many hearing officers. The plan should include consideration of caseload trends and the minimum number of hearing officers needed in each region.

Role of Hearing Officers in Deciding Cases Needs to Be Defined

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- **Currently, there are differences of opinion as to a hearing officer's role in deciding grievance cases, particularly those involving discipline.**
- **Given the far-reaching implications for employee grievance outcomes, it appears appropriate that the General Assembly articulate the role of hearing officers in employee grievances.**
- **Explicit rules for disciplinary cases would result in increased consistency of decisions and provide a mechanism for evaluation of hearing officer performance.**

Recommendations

33

- **The General Assembly may wish to define the role of hearing officers in deciding cases, particularly those involving employee discipline. Factors to consider would include whether the hearing officer should independently determine an appropriate discipline for a misconduct taken or whether the hearing officer should only review the agency's discipline imposed for consistency with policy, and whether hearing officers should consider mitigating circumstances in arriving at their decisions.**
- **DERC should modify its hearing officer guidance documents to reflect the General Assembly's definition of the role of hearing officers in grievances.**

DERC's Hearing Officer Training Needs to Be Enhanced

34

- **Hearing officers must attend DERC training annually to be eligible to hear grievance cases. In addition, new hearing officers are required to attend an orientation session.**
- **The hearing officer training provided by DERC is generally well received by the hearing officers.**
- **However, there are two primary concerns that have been frequently raised about DERC's training:**
 - **Training materials are not tied closely to the types of grievance cases commonly heard.**
 - **Hearing officers do not get to discuss, or even hear about, actual cases or practical issues that arise during hearings.**

Recommendations

35

- **DERC should expand its training for new grievance hearing officers to orient hearing officers more completely to State personnel policies.**
- **DERC should revise its training program to better address the types of cases hearing officers hear most often. Further, opportunities should be provided at the training to discuss actual examples of case decisions and procedural issues that periodically arise.**

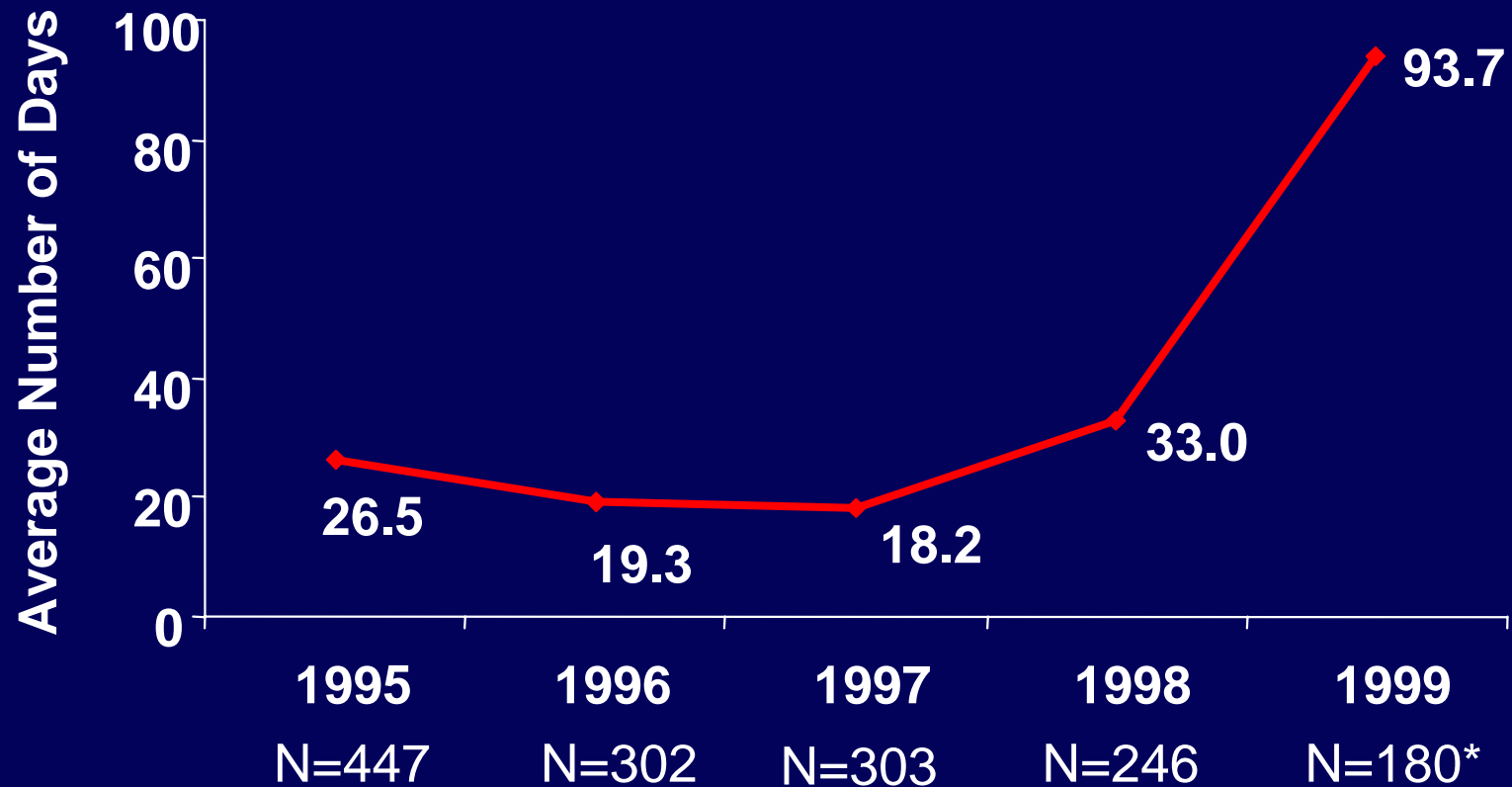
DERC Needs to Issue Rulings in a More Timely Manner

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- DERC issues formal rulings regarding access to and compliance with the grievance procedure as well as qualification for a grievance hearing.
- The average number of days DERC took to issue its rulings has risen sharply in the past two years.
 - The average number of days for DERC rulings increased from 18.2 in 1997 to 93.7 in 1999 -- an increase of more than 400 percent.
- DERC staff attribute the increase to a staff shortage that began in the summer of 1998.
- DERC needs to place a higher priority on addressing the problem of lengthy delays in its rulings.

Average Number of Days for DERC to Issue Rulings

37



* Rulings through November 23, 1999

Recommendation

38

- **DERC should place a higher priority on reducing the backlog of cases awaiting rulings from the agency, and ensure that rulings on future cases are issued in a timely manner similar to levels achieved in 1997.**

DPT Needs to Address Consistency of Decisions with Agency Policies

39

- Under the grievance procedure, parties to a grievance may request a ruling from the Department of Personnel and Training (DPT) concerning whether a hearing officer's decision is consistent with policy.
- DPT draws a distinction between policies promulgated by individual agencies and those promulgated by DPT, ruling only on the consistency of a decision with the policies it issues.
- Therefore, there is no recourse to correct decisions that are inconsistent with agency policies.

Recommendation

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- **DPT should study possible options for ensuring that hearing officer decisions are consistent with agency policies. It should report on its findings and any subsequent action taken to the House and Senate General Laws Committees by July 1, 2000.**

Assessment of the Need for an Appeals Process

41

- Establishing an appeals process would constitute a major change to the current grievance system.
- The JLARC review has shown that the system has some deficiencies, but these deficiencies do not represent fundamental problems that could only be addressed through an appeals process.
- Further, an appeals process would be costly and time-consuming.
- It appears that the introduction of a formal appeals process is not warranted at this time.

Alternative Structures for a Grievance Hearing System

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- One of the issues prompting this study was a proposal by DERC to move toward a full-time hearing officer system for grievances.
- JLARC staff found that the use of full-time hearing officers might have some advantages over the current system in the areas of consistency and experience.
- However, the loss of independence and subsequent appearance of bias could erode trust in the system. Further, a full-time system would not result in cost savings.

Alternative Structures for a Grievance Hearing System

(continued)

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- The current structure best provides for the impartiality and independence of hearing officers.
- The goals of greater consistency and expertise could be achieved without adopting a full-time hearing officer structure.
 - This report provides several recommendations to improve consistency, expertise, and the overall quality of hearing officer decisions within the current structure.
- It appears that adoption of the recommendations in this report would result in a structure that adequately meets the goals for a sound hearing system.